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IN THE

# Supreme Court of the United States

LESTER GERARD PACKINGHAM,
*Petitioner,*

*v.*

NORTH CAROLINA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

## BRIEF FOR *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF PETITIONER

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

ARI J. SAVITZKY
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

MARK C. FLEMING
*Counsel of Record*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

ADDITIONAL COUNSEL ON INSIDE COVER

ESHA BHANDARI
LEE ROWLAND
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

CHRISTOPHER A. BROOK
ACLU OF NORTH
CAROLINA LEGAL
FOUNDATION, INC.
P.O. Box 28004
Raleigh, NC 27611

ILYA SHAPIRO
DEVIN WATKINS
CATO INSTITUTE
1000 Massachusetts
Avenue NW
Washington, DC 20001

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

I. SECTION 202.5 IS UNCONSTITUTIONALLY OVERBROAD ..... 4

A. Section 202.5 Prohibits A Wide Array Of Online Speech And Information-Gathering, Including Core Political And Religious Speech ..... 7

B. Section 202.5 Criminalizes Vast Amounts Of Protected Speech That Is Unrelated To The Safety Of Minor Children ..... 13

C. Section 202.5 Is Unconstitutional Prophylaxis ..... 16

II. SECTION 202.5 IS UNCONSTITUTIONALLY VAGUE ..... 17

A. Particularly Where They Implicate First Amendment-Protected Activity, Criminal Laws Must Not Be Vague ..... 18

B. An Ordinary Person Cannot Discern The Limits Of Section 202.5 ..... 19

III. SECTION 202.5 IMPERMISSIBLY TARGETS SPEECH BASED ON THE IDENTITY OF THE SPEAKER ..... 26

**TABLE OF CONTENTS—Continued**

Page

A. This Court Has Repeatedly Rejected Laws That Single Out Particular Speakers And Burden Their Expression ..... 26

B. Laws That Target Disfavored Speakers Are Contrary To The Original Purpose Of The Bill Of Rights ..... 29

CONCLUSION ..... 31

## TABLE OF AUTHORITIES

### CASES

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*Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) ..... 26

*Baggett* v. *Bullitt*, 377 U.S. 360 (1964) ..... 19, 24

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*City of Chicago* v. *Morales*, 527 U.S. 41 (1999) ..... 18, 25

*City of Ladue* v. *Gilleo*, 512 U.S. 43 (1994) ..... 11, 27

*Clark* v. *Martinez*, 543 U.S. 371 (2005) ..... 19

*Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) ..... 20

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N.C. Gen. Stat.
§ 14-202.1 ..... 17
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§ 14-202.5(a) ..... 7, 8, 19, 20
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§ 14-202.5(b)(3) ..... 11
§ 14-202.5(c) ..... 9, 15
§ 14-202.5(c)(2) ..... 11
§ 14-202.5(e) ..... 9
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§ 14-208.6(4) ..... 8, 14
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## BRIEF FOR *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*[1]

*Amici* have long advocated for the freedom of speech and expression in all its forms against encroachment by governmental power, particularly through the criminal law. *Amici* view the criminal statute at issue in this case as a sweeping and unconstitutional incursion on protected speech, and urge the Court to reverse the judgment of the Supreme Court of North Carolina.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission. Both parties have filed letters consenting to the filing of all *amicus* briefs.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, limited government, and peace. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review.*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 750,000 members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases addressing criminal prohibitions on speech. *See Virginia* v. *Black*, 538 U.S. 343 (2003); *United States* v. *Stevens*, 559 U.S. 460 (2010); *Elonis* v. *United States*, 135 S. Ct. 2001 (2015). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members. The American Civil Liberties Union of North Carolina is a state affiliate of the national ACLU.

## SUMMARY OF ARGUMENT

Section 202.5 of North Carolina's criminal law cannot be reconciled with core First Amendment principles and decades of this Court's jurisprudence. Petitioner was convicted of a crime because he wrote a celebratory post on Facebook, exclaiming that "God is good" after he obtained the dismissal of a traffic ticket. More generally, the statute makes it a standalone violation of North Carolina's criminal code for any person who has previously been convicted of one of a host of

sexually related crimes, but is no longer under any form of incarceration or state supervision, to "access" a dizzying array of websites, including the websites of major newspapers and ubiquitous social media sites.

North Carolina's far-reaching criminalization of speech, information-gathering, and expression is unconstitutional for at least three reasons.

*First*, Section 202.5 is substantially overbroad, barring *any* use of websites like Facebook, YouTube, and Wikipedia, and even the reading of such news sites as *The New York Times*. The most natural interpretation of Section 202.5 suggests that it could apply to almost any website at all, subject only to the whims of those enforcing it. Section 202.5 potentially subjects thousands of people to criminal penalties based on protected expression relating to art, politics, religion, and family life that will almost always bear no relation to the law's supposed justification of protecting children from predators. Indeed, the only possible purported justification for Section 202.5 is that it operates as a broad-based prophylaxis against other behavior. But this Court has time and again rejected governmental efforts to justify sweeping and imprecise bans on protected speech simply because the ban includes within its scope a smaller category of unprotected speech or expression.

*Second*, Section 202.5 is also hopelessly vague. Criminal liability under the statute hinges on whether it is "known" that the website that is "accessed" somehow "permits" minor children to create profiles or pages. To the extent "permits" is tied to a website's terms of use, it provides no reasonable opportunity to know what is prohibited. The terms employed by even the most popular websites are hardly a model of clarity with regard to who may and may not use the site—

never mind that the terms themselves are normally only accessible by visiting the website, which potentially violates the statute by itself. And even if a site's terms of use clearly purport to bar minor children, such terms are frequently unenforced or ignored, leaving people to guess whether "permits" means in policy or in fact (or something else). Whatever answer one reaches about whether a given site "permits" use by minor children, the term is so capacious that those enforcing the statute could always reach a different answer depending on their whims. That is a telltale sign of vagueness. Section 202.5 therefore falls far short of the high degree of specificity this Court has long required for criminal prohibitions that intrude on First Amendment freedoms.

*Third*, Section 202.5 criminalizes speech based on the identity of the speaker—a hornbook First Amendment violation in itself, and one the Founders specifically sought to prevent.

This Court should reverse the judgment below and affirm, once again, that the Constitution does not permit sweeping prohibitions on speech, expression, and the receipt of information by disfavored members of society.

## ARGUMENT

### I. SECTION 202.5 IS UNCONSTITUTIONALLY OVERBROAD

For those to whom it applies, Section 202.5 is virtually boundless. The statute's plain language indicates that its prohibition encompasses the vast majority of the nation's most-visited and important websites. Although the statute's purported aim is to stop online stalking and predation of minor children, its effect is to criminalize massive amounts of online activity—from e-commerce, to family communications, to political and

religious speech—that fall far outside any legitimate State goal. Section 202.5 is a textbook case of unconstitutional overbreadth.

Section 202.5 warrants the most exacting scrutiny because its direct criminal prohibition on speech sweeps in large amounts of core protected speech, including religious and political speech and information-gathering, which are subject to the highest levels of First Amendment protection. *See, e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'"); *see also, e.g.*, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech ... is as fully protected under the Free Speech Clause as secular private expression. ... [A] free-speech clause without religion would be Hamlet without the prince."). Strict scrutiny is also appropriate because the statute singles out speech based on the disfavored identity of the speaker, rather than anything actually harmful about the speech itself. *See infra* Part III.

But Section 202.5 would still fail the overbreadth analysis if it were subject to a lower level of scrutiny. Even if Section 202.5 were viewed as a regulation of conduct ancillary to speech, or a content-neutral speech restriction subject to less exacting scrutiny, it must still be "'narrowly tailored to serve a significant governmental interest'" and may not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2534-2535 (2014) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796, 799 (1989)). In other words: If Section 202.5 prohibits far more speech than necessary to achieve its legitimate aims, it should be struck

down as overbroad regardless of the applicable level of scrutiny. Thus, this Court found a total ban on "First Amendment activities" at the Los Angeles airport to be overbroad because it "prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution." *Board of Airport Comm'rs of City of L.A.* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574-575 (1987) (statute was overbroad even if LAX was viewed as a nonpublic forum subject to lesser scrutiny).

A statute is unconstitutionally overbroad under the First Amendment where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The overbreadth doctrine guards against imprecise criminal laws whose extensive scope may chill legitimate, protected expression. *See, e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 768-769 (1982) ("'[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" (citations omitted)); *see also Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (when the government restricts speech, "[p]recision of regulation must be the touchstone").[2]

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[2] The potential chilling of protected speech by overbroad criminal laws is so concerning that overbreadth challenges against speech-restrictive statutes are allowed even when advanced by defendants whose conduct might be properly proscribed under a more narrowly tailored law. *See Ferber*, 458 U.S. at 768-769.

The overbreadth analysis proceeds in two steps. First, the Court "construe[s] the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (quoting *United States* v. *Williams*, 553 U.S. 285, 293 (2008)). Next, the Court considers the ultimate question whether "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473, 481-482.[3]

### A. Section 202.5 Prohibits A Wide Array Of Online Speech And Information-Gathering, Including Core Political And Religious Speech

Section 202.5 applies to any person who is a registered sex offender under North Carolina law. *See* N.C. Gen. Stat. § 14-202.5(a). North Carolina's registry law in turn applies whether or not a former offender is on parole or probation. *See generally id.* §§ 14-208.5 *et seq.* It applies for life as to those who have committed certain "sexually violent" offenses, and for a period of 30 years for all others. *Id.* §§ 14-208.6A, 14-208.7, 14-208.21.[4] It applies to former offenders who were convicted in North Carolina and out-of-state, under state

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[3] This Court has ruled that, "where conduct and not merely speech is involved," overbreadth must be "substantial" to transgress the Constitution. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Here, Section 202.5, which prohibits all reading or communication on certain websites, targets exclusively speech, not conduct, and thus may be struck down even if its overbreadth is less than "substantial." Nevertheless, because of the virtually limitless scope of Section 202.5, it fails even under *Broadrick*'s more demanding standard.

[4] This 30-year period may be reduced to a minimum of 10 by court order. N.C. Gen. Stat. § 14-208.12A.

or federal law. *Id.* § 14-208.6(4). And importantly, the covered offense conduct runs the gamut from sexual assault against an adult, to statutory rape, to various forms of "secret peeping," to non-sexual offenses like kidnapping. *Id.* § 14-208.6(4)-(5). Thus, the registry law draws in numerous former offenders whose crimes never involved minor children or online solicitation or predation of any kind.

Under Section 202.5, any person required to register—that is, any person who has committed any of the offenses listed in the registry statute in the last 30 years or more—may not "access a commercial social networking Web site where the [person] knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. § 14-202.5(a). And "commercial social networking Web site" is in turn defined as any site that:

> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
>
> (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

> (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

*Id.* § 14-202.5(b). This broad definition is subject to two express exceptions: It does not include websites that "[p]rovide[] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or [h]a[ve] as [their] primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." *Id.* § 14-202.5(c). "[A]ccess[ing]" a covered site is a felony. *Id.* § 14-202.5(e).

Section 202.5 criminalizes *any* use of a covered site. "Accessing" a website can encompass myriad interactions ranging from creating an account and actively communicating through a social media site, to the most passing of uses, such as checking a store's business hours on a public Facebook page located through a Google search, or simply spending a few seconds on a site before realizing that one typed in the wrong web address.[5]

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[5] Or, as noted, *infra* p. 20, consulting the site's terms of use to try to determine whether it is covered by Section 202.5 in the first place. Moreover, any as-yet-identified limiting construction of the word "accessing" is likely to present an independent vagueness problem. That is particularly true in today's online environment, where many organizations have, for example, integrated Facebook into their websites as a comment platform. *See, e.g.*, Buzzfeed, www.buzzfeed.com (incorporating Facebook-based commenting for Buzzfeed articles); St. Louis Post-Dispatch, www.stltoday.com (same). Whether one has "accessed" Facebook by "accessing" a Buzzfeed page that integrates Facebook is far from clear (not to mention completely unrelated to Section 202.5's actual purposes).

Concrete examples demonstrate the statute's sweep. Section 202.5 appears to cover *any* use or viewing of social media and networking sites such as Facebook, Twitter, Instagram, and LinkedIn, which are among the Nation's preeminent fora for communication and the exchange of information and ideas. *See, e.g.*, Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014) ("Social media is a necessary part of modern interaction."). It also seems to cover *any* viewing of discussion sites like Reddit that facilitate message boards on an unlimited array of topics, but also include other functionality, or Wikipedia, which is built and run by users who create profiles and group-edit the world's most popular encyclopedia in the site's discussion fora. *Cf.* Grimmelmann, *The Virtues of Moderation*, 17 Yale J. L. & Tech. 42, 79-102 (2015) (discussing the functions of Reddit and Wikipedia and the nature of such decentralized, user-moderated fora). It also apparently covers *any* use of web-based streaming sites like YouTube or Spotify, which allow users to watch videos or listen to music but also incorporate social functionality. And it would seem to encompass *any* use of some of the most important news sites, almost all of which feature commenting functions where users can create profiles and discuss and share perspectives on news content and current events. Indeed, the Supreme Court of North Carolina did not deny that Section 202.5 may ban covered persons from accessing the websites of the *New York Times* and other major news publications. *See* Pet. App. 17a (responding to this objection only by observing that "users may follow current events on WRAL.com, which requires users to be at

least eighteen years old [sic] to register with the site"); *see also* Pet. App. 33a (Hudson, J., dissenting).[6]

The result is that persons covered by Section 202.5 face criminal penalties for a dizzying array of expression and communication that encompasses the entirety of the social Web. *Cf. City of Ladue* v. *Gilleo*, 512 U.S. 43, 57 (1994) (striking down ban on residential lawn signs and noting that they are "an unusually cheap and convenient form of communication" that "may have no practical substitute."). Indeed, it appears that Petitioner and similarly situated residents of North Carolina would be forbidden from:

- watching (let alone commenting on) a documentary on the ongoing strife in Syria on the *New York Times* website;

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[6] The statute also seems to prohibit access to numerous e-commerce sites such as Amazon. That is because, while Section 202.5 exempts a site that has "as its primary purpose the facilitation of commercial transactions ... *between its members or visitors*," N.C. Gen. Stat. § 14-202.5(c)(2) (emphasis added), this exception by its terms applies only to peer-to-peer commercial sites, and not commercial sites where the transactions are between members or visitors and the site itself. *See* Pet. App. 33a & n.1 (Hudson, J., dissenting). Thus, almost all major consumer brand websites—such as those for Wal-Mart and Betty Crocker—are covered if they host comment or review sections and allow users to make profiles and engage in "information exchange[]" about the site's products. N.C. Gen. Stat. § 14-202.5(b)(3); *see also, e.g.*, Walmart.com (selling products and allowing users to create free profiles and comment on and discuss products); Bettycrocker.com (selling products and allowing users to create free profiles and comment on and discuss recipes). Again, the Supreme Court of North Carolina did not deny this; the most it could say was that a person barred from viewing the Betty Crocker website could visit the Paula Deen Network instead. *See* Pet. App. 17a.

- reading (let alone participating in) a discussion on /r/The_Donald, a major Reddit forum for supporters of President-Elect Donald Trump;
- visiting the profile page of a family member (let alone communicating with him or her) on Facebook, an Internet forum on which the majority of American adults share news, opinions, and updates about their lives;
- reading (let alone participating in) a discussion of local policing and criminal justice policy on Twitter;
- researching (let alone editing or discussing) an entry on the history of the Roman Republic on Wikipedia;
- searching for connections (let alone developing a professional network) on LinkedIn in order to seek new employment;
- listening to (let alone sharing or commenting on) the soundtrack to the Broadway musical *Hamilton* on Spotify;
- watching (let alone commenting on or sharing) a weekly sermon posted by one's church on YouTube.

Speech prohibited by Section 202.5, including discussion of public issues on fora like Facebook, falls in the heartland of the First Amendment's protection. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). And the statute also criminalizes forms of information-gathering—including regarding current events and political and religious matters—that this Court has also held to be within the core of First Amendment protection. *See Sorrell* v. *IMS Health*,

*Inc.*, 564 U.S. 552, 567-570 (2011) (rejecting argument against full First Amendment protection where state law regulated "access to information"); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (First Amendment protects the "right to receive information"). Given its massive sweep, Section 202.5 violates the First Amendment's overbreadth prohibition regardless of the applicable level of scrutiny.

### B. Section 202.5 Criminalizes Vast Amounts Of Protected Speech That Is Unrelated To The Safety Of Minor Children

Section 202.5 fails this Court's established overbreadth test, reaching far beyond its supposed justifications and criminalizing protected speech and expression that have no relation to North Carolina's legitimate interests.

Section 202.5 is ostensibly meant to protect minor children from recidivist sexual predators. *See, e.g.*, Pet. App. 11a. But the provision is not restricted in its application to communications, expression, or information-gathering that is targeted at or has any relation to minor children. Instead, it sweeps up vast amounts of otherwise protected speech, including the receipt and communication of personal, political, civic, artistic, and religious ideas on many of the Internet's most widely used fora. The range of covered sites that may not be "access[ed]" on pain of felony conviction is vast (to the extent that it is discernable at all), and appears to include any site that (1) somehow generates revenue and (2) allows users to interact through some form of social functionality. This expansive category includes many of the nation's most popular and important websites. *See* Alexa, Top Sites in the United States, http://www.alexa.com/topsites/countries/US (listing YouTube,

Facebook, Amazon, Wikipedia, Reddit, Twitter—all of which are covered by Section 202.5—as six of the ten most-visited domains on the Web); *supra* pp. 8-12. The decision below made no attempt to excuse this dragnet, and instead merely asserted that the website of a local news channel was an adequate substitute for the websites of myriad major national newspapers to which access is denied. Pet. App. 17a. An overbroad ban on access to most of the nation's news sources cannot be saved by access to a single local news site.

Nor is Section 202.5 restricted in its application to those with a history of targeting minor children. Rather, it covers persons whose offenses involved adult victims, as well as some persons whose offenses were not sexual in nature at all. *See* N.C. Gen. Stat. § 14-208.6(4)-(5); *supra* pp. 7-8. And that overbroad universe of persons is in turn subject to overbroad restrictions on expressive activity.

The Constitution does not permit the government to outlaw a broad category of speech simply because it contains a smaller category that might be proscribable. As this Court has held, "[t]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997).

This Court's recent overbreadth decision in *Stevens* is right on point. There, a federal law that was intended to prohibit the sale of so-called "crush videos"—depictions of illegal animal abuse—swept far more broadly, criminalizing "any ... depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," thus outlawing, for example, depictions of unlicensed hunting, or the slaughter of cattle in

violation of local slaughterhouse regulations, or cosmetic "docking" of animals' ears or tails. 559 U.S. at 477. Because the statute covered depictions far beyond its supposed purpose, and because the government could offer no constitutional argument justifying the statute's application to those depictions, this Court struck it down as overbroad. *Id.* at 481-482.

If anything, overbreadth is even more obvious in this case. Under the Supreme Court of North Carolina's own reading of the statute, Section 202.5 proscribes a vast universe of expressive activity far removed from any legitimate State interest in stopping predation on minor children. The Constitution prohibits a sweep of that breadth, which proscribes protected speech wholly unrelated to the ostensible purpose motivating the law.[7]

Indeed, this case presents an example of the statute's lack of tailoring: Petitioner broke the law by announcing on Facebook that a local court had dismissed his traffic ticket and by exclaiming that "God is good." North Carolina's prohibition on Petitioner's communication regarding his personal interaction with local authority and his faith in a higher power—and his "accessing" of Facebook in order to proclaim it—has no discernable relationship to the statute's purpose of protecting minor children.

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[7] Section 202.5 is so poorly tailored that it is noticeably *under-inclusive*, leaving unaddressed some types of expression that actually come much closer to its purported justification. For example, Section 202.5 expressly does not prohibit actual communication between those convicted of sexual offenses and minors via email or some single-purpose chat rooms. *See* N.C. Gen. Stat. § 14-202.5(c).

### C. Section 202.5 Is Unconstitutional Prophylaxis

Section 202.5's lack of tailoring is by design. The statute takes an improperly "prophylactic" approach—the exact type of approach to speech regulation that this Court has time and again viewed with grave suspicion.

This Court has continually rejected prophylactic laws that target antecedent speech rather than subsequent harm. *See, e.g.*, *Riley*, 487 U.S. at 801 ("'Broad prophylactic rules in the area of free expression are suspect.'" (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963))); *see also, e.g.*, *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) (blanket prohibition on indecent but not obscene "dial-a-porn" phone lines violated First Amendment notwithstanding interest in protecting minor children); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (prohibition on charitable solicitation was overbroad and not justified by fraud prevention); *In re Primus*, 436 U.S. 412, 436-437 (1978) (sweeping prohibition on attorney's client solicitation not justified by state's interest in preventing vexatious litigation); *Button*, 371 U.S. at 439-440 (state's interest in preventing champerty, barratry, and maintenance did not justify prohibition on solicitation by NAACP and public interest lawyers).

Section 202.5 is triply prophylactic. *Cf. McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1458 (2014) (plurality opinion) (striking down aggregate contribution limits where contributions to individual campaigns were already limited, and explaining that "[t]his 'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit"). First, it covers *all* communication and reading of social media and numerous other sites, not just speech directed to or involving minors. Second, even for speech involving mi-

nors, the law is not targeted at improper speech (such as solicitation), which North Carolina already targets with other laws. *See* N.C. Gen. Stat. § 14-202.1 (criminalizing taking indecent liberties with a child); *id.* § 14-202.3 (criminalizing solicitation of a child by computer or certain other electronic devices). Rather, Section 202.5 criminalizes perfectly innocent conduct, such as reading the public Twitter feed of a 17-year-old celebrity, communicating with a minor relative through Facebook about family matters, or debating religious tenets with a 16-year-old in the comments section of a *New York Times* opinion piece. And Section 202.5 is prophylactic in still a third way, as it applies to the speech of some persons whose initial offenses had nothing whatsoever to do with minors in the first place.

The amount of protected speech covered by Section 202.5 thus far exceeds the statute's legitimate sweep—a mismatch that cannot be justified by the small category of speech that might have been constitutionally proscribed by a properly tailored law. The substantial overbreadth doctrine exists for misguided laws like Section 202.5.

## II. Section 202.5 Is Unconstitutionally Vague

Section 202.5 is unconstitutional for another reason: It is impermissibly vague and thus violates the Due Process Clause. In particular, Section 202.5 requires those covered by the statute to determine whether a given website "permits" use by minors, whether in fact or in policy. An ordinary citizen's inability to answer those questions makes it impossible to know in advance what conduct is proscribed and, at the same time, bestows on law enforcement virtually unbounded discretion to arrest and charge citizens for alleged violations.

The Due Process Clause requires more. Especially where First Amendment freedoms are implicated and the risk of chilling protected expression falling outside the statute's purview is high, legislatures must act with the utmost specificity. Yet Section 202.5 lacks the basic specificity required for North Carolinians to determine where the statute's ambit ends and their freedom from criminal prosecution begins.

### A. Particularly Where They Implicate First Amendment-Protected Activity, Criminal Laws Must Not Be Vague

Woefully imprecise criminal laws have no place in our constitutional order. Legislation that either "fails to give ordinary people fair notice of the conduct it punishes" or that is "so standardless that it invites arbitrary enforcement" violates the Due Process Clauses of the Fifth and Fourteenth Amendments. *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015).

This bedrock principle applies to all laws, regardless of the nature of the conduct proscribed.[8] But

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[8] The Supreme Court of North Carolina declined to address Petitioner's facial vagueness challenge because his conduct fell "squarely within the scope of the statute." Pet. App. 27a. That was error; vagueness challenges may be asserted by a defendant even where his own conduct is clearly within the challenged statute's ambit, particularly where the statute makes an unrestrained grant of enforcement discretion. *See Johnson*, 135 S. Ct. at 2560-2561 (finding the residual clause of the Armed Career Criminal Act unconstitutionally vague without considering its application to the petitioner, noting that "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp"); *City of Chicago* v. *Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who

where a state purports to criminalize activity that is protected by the First Amendment, an even "greater degree of specificity" is required to withstand a vagueness challenge. *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). The heightened specificity requirement in cases implicating the First Amendment is necessary to prevent a chilling effect on protected speech. Vague criminal laws that "abut upon sensitive areas of basic First Amendment freedoms" will invariably require those seeking to comply to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). Faced with such statutes, people will refrain from speaking rather than risk criminal charges, a loss of First Amendment freedoms that is irrevocable. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

### B. An Ordinary Person Cannot Discern The Limits Of Section 202.5

Section 202.5 makes it a crime for certain persons to "access" certain websites "where the [person] knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. § 14-202.5(a). But Section 202.5 does not specify what it means to "permit[]" such conduct, such

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may also be adversely impacted by the statute in question."); *cf. Clark* v. *Martinez*, 543 U.S. 371, 397-398 (2005) (Thomas, J., dissenting) ("[O]ur rules governing third-party challenges ... are more lenient in vagueness cases."). *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010), which holds that a plaintiff whose speech is clearly proscribed cannot raise a successful claim under the Due Process Clause of the Fifth Amendment *for lack of notice*, is not to the contrary.

that it is unclear what the knowledge requirement amounts to. An ordinary person confronted with this portion of Section 202.5's text would be unable to determine whether a particular website fell within its proscription, and therefore unable to "intelligently choose, in advance, what course it is lawful for him to pursue." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393 (1926). That is the essence of unconstitutional vagueness. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (holding that laws are unconstitutionally vague unless they provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited").

How does a person "know" whether a website "permits" participation by minors? The Supreme Court of North Carolina noted the vagueness problems in answering that question, but declined to resolve them beyond suggesting that one might consult the website's terms of use. Pet. App. 17a-18a. But under the literal terms of the statute, the very act of "accessing" a website to read its terms of use could, depending on the predispositions of the investigating officer, be considered a criminal act in itself. *See* N.C. Gen. Stat. § 14-202.5(a). That one might trigger liability by following the state supreme court's dictum on how to avoid liability is a telltale sign of a law that is too vague to be constitutionally enforceable.

Moreover, even if one could consult a website's terms of use without triggering liability under Section 202.5, the answers available are anything but definitive. Some sites have terms of use that are ambiguous or legally complex.[9] Others have multiple public versions of

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[9] *See, e.g.*, Spotify, *Terms and Conditions of Use* (Sept. 9, 2015), https://www.spotify.com/us/legal/end-user-agreement/ (providing

their terms of use which appear to be contradictory on the key question of use by minors.[10]

The incidence of ambiguities and unanswered questions within the terms of use is not particularly surprising. These documents were not drafted by elected officials or legislative committees, nor were they designed as the dividing lines between lawful and criminal activity. But if North Carolina takes the unusual step of allowing a deprivation of its citizens' liberty interests to turn on the usage policies of countless privately operated websites, then those websites' policies become part of the constitutional analysis. And as these examples make clear, they fail the specificity requirements of due process. Someone of ordinary intelligence reading the terms closely would still be hopelessly confused as to

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that users must "be 18 or older, or be 13 or older and have your parent or guardian's consent to the Agreements (except as set forth in [an extensive chart covering age-restrictions in particular countries])" and that additionally users must "have the power to enter a binding contract with us and not be barred from doing so under any applicable laws"); N.Y. Times, *Terms of Service* § 6.1 (Nov. 17. 2015), http://www.nytimes.com/content/help/rights/terms/terms-of-service.html (providing that "[y]ou must be 13 years or older to subscribe to all parts of the Services" but not explaining whether there is any age limit on the site's embedded commenting system and social functions).

[10] *Compare* LinkedIn, *Terms of Service* § B.3 (June 16, 2011), https://www.linkedin.com/static?key=pop%2Fpop_multi_currency_user_agreement&type=sub (appearing to restrict service to those who "represent and warrant" that they are over 18), *with* LinkedIn, *User Agreement* § 2.1 (Oct. 23, 2014), https://www.linkedin.com/legal/user-agreement ("'Minimum Age' means (a) 18 years old for the People's Republic of China, (b) 16 years old for the Netherlands, (c) 14 years old for the United States, Canada, Germany, Spain, Australia and South Korea, and (d) 13 years old for all other countries").

whether many of these sites—some of the most popular sites on the Internet—"permit" use by minors.

Furthermore, even where a site purports clearly to ban use by children under a certain age, these rules are often flouted in practice. A determined child can easily circumvent the existing age-verification systems; as the former chief security officer for MySpace put it, "everybody knows it doesn't really work." Perlroth, *Verifying Ages Online Is a Daunting Task, Even for Experts*, N.Y. Times (June 17, 2012). Similarly, although many of the most popular online dating sites, like OKCupid and Tinder, prohibit use by minors,[11] both websites are manifestly used by—and indeed, are popular among—teens. *See, e.g.*, Conway, *Tinder and 5 More Adult Dating Apps Teens Are Using, Too*, Common Sense Media (Feb. 6, 2016), https://www.commonsensemedia.org/blog/tinder-and-5-more-adult-dating-apps-teens-are-using-too; Quora, *What are some teen dating apps*?, https://www.quora.com/What-are-some-teen-dating-apps (last visited Dec. 22, 2016) ("There are already a lot of teenagers" on OKCupid, and those teenagers "use the app to find dates or connect with other teens in their area."). The popular crowdfunding site Kickstarter also prohibits use by minors,[12] yet high schoolers are no

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[11] OKCupid, *Legal Information* (Dec. 15, 2016), https://www.okcupid.com/legal/terms ("This Website is not intended for children under 18 years of age. If you are under 18, you are not authorized to use this Website and will not be afforded access to any features of this Website that allow for you to provide information to us or to share information with other users of this Website."); Tinder, *Terms of Use* (Sept. 14, 2016), https://www.gotinder.com/terms ("You must be at least 18 years of age to create an account on Tinder and use the Service").

[12] Kickstarter, *Terms of Use* (Oct. 19, 2014), https://www.kickstarter.com/terms-of-use ("To sign up for an account, you need

strangers to it. *See, e.g.*, Hayden, *High School Student Designs Snap-together Cardboard, Kickstarter Now Live*, Road to VR (May 15, 2015), http://www.roadtovr.com/high-school-student-designers-snap-together-cardboard-kickstarter-now-live/; Hintze & VanDuzer, *Start a Business in High School in 7 Steps*, Student Tutor, http://student-tutor.com/blog/start-a-business-in-high-school-in-7-steps/ (last visited Dec. 22, 2016) (encouraging high school students to use Kickstarter to start businesses). Unauthorized underage use of this sort is also prevalent in other areas of the Internet, such as online gaming sites.

It is hardly clear whether a person covered by Section 202.5 can or cannot use such sites. Merely checking their terms of use might reasonably suggest that use by minors is not "permitted," but one who uses them might later be arrested upon learning that the authorities interpreted the statute to include sites that permitted use by minors *de facto*, even if not *de jure*. The other side of the coin is also problematic: Even if most North Carolina officers would not look beyond the terms of use, people subject to the statute could reasonably wish to stay well clear of these websites (and thus forego protected expression) for fear of prosecution based on widely reported actual use by minors. Either scenario runs afoul of the vagueness doctrine.[13]

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to be at least 18 years old, or old enough to form a binding contract where you live. If necessary, we may ask you for proof of age.").

[13] Further questions about the scope of liability under Section 202.5 abound. Is it sufficient to know that a site's terms of use contain some age requirement, as the Supreme Court of North Carolina suggested? If so, how clearly and stringently must such terms be worded? Must there be some knowledge of how the age requirement is enforced, and/or whether it can be or is in fact flouted? Can a defendant be charged with knowledge of usage in fact

Similar concerns about an ambiguous knowledge requirement doomed the statute challenged in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). That case addressed a Washington statute that barred employment of "subversive person[s]," defined to include "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises, or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act" designed to overthrow the United States' constitutional democracy. *Id.* at 362. State employees were required to take an oath swearing that they met these requirements. *Id.*

This Court found the oath requirement invalid on vagueness grounds because it failed to specify what a particular oath-maker must know. *Baggett*, 377 U.S. at 369. The Court wondered, for example, whether the subscriber must "know that his aid or teaching [would] be used by another and that the person aided has the requisite guilty intent or is it sufficient that he knows that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government?" *Id.*; *see also Lanzetta* v. *New Jersey*, 306 U.S. 451, 458 (1939) (phrase "known to be a member" impermissibly vague because it was unclear whether actual or reputed membership was meant; "[i]f reputed membership is enough, there is uncertainty

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that is contrary to the terms of use? If so, will any amount of usage by minor children be sufficient to bring a website within the statute's ambit? What about websites where ages are not even listed in users' online profile, such as the commenting systems used by some major newspapers? These multiple indeterminacies compound one another, resulting in an interpretive morass that an ordinary citizen cannot hope to untangle. *Cf. Johnson*, 135 S. Ct. at 2558 (combining indeterminacies "produces more unpredictability and arbitrariness than the Due Process Clause tolerates").

whether that reputation must be general or extend only to some persons"; and "the statute fails to indicate what constitutes membership").[14] The result here should be no different.

Furthermore, by allowing criminal liability to turn on an ambiguous and manipulable standard, Section 202.5 creates a real risk of arbitrary or discriminatory enforcement. Legislatures have long been required to "'establish minimal guidelines to govern law enforcement,'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), for without such guidelines, a statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation," *Lewis* v. *City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring). Delegating the decision whether certain conduct is unlawful to the "policeman on his beat" turns what should be a neutral legal standard into "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Kolender*, 461 U.S. at 360 (quoting *Smith*, 415 U.S. at 575 and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972)); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 47 (1999) (loitering ordinance that proscribed "remain[ing] in any one place with no apparent purpose" struck down). This case—which involves a law that already singles out a disfavored and stigmatized minority, *see infra* Part III—presents the exact same concerns.

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[14] *United States* v. *Williams*, which respondent cited in opposing certiorari, does not resolve this concern. That case held only that where a statute's requirements are "clear," the "mere fact that close cases can be envisioned" does not make the statute void for vagueness. 553 U.S. 285, 305 (2008). It does not address the situation where, as here, a statute's knowledge requirement is itself indeterminate.

Whether a given website's efforts (or lack thereof) in enforcing age requirements mean that it "permits" some uses by minors is utterly vague. Language of "such a standardless sweep" affords North Carolina's officials free rein to "pursue their personal predilections." *Smith*, 415 U.S. at 575. In this context, it creates an environment in which persons are permitted to use the Internet "only at the whim of any police officer." *Papachristou*, 405 U.S. at 170. Due process does not permit such a system.

## III. Section 202.5 Impermissibly Targets Speech Based On The Identity Of The Speaker

Even if Section 202.5 could pass muster under this Court's established overbreadth and vagueness standards, it would be unconstitutional for a third, independent reason: It targets speech based on the identity of the speaker. North Carolina's targeting of an unpopular, disfavored group for massive speech suppression runs counter to the original purpose of the First Amendment, and this Court should not tolerate it here any more than it has in other contexts.

### A. This Court Has Repeatedly Rejected Laws That Single Out Particular Speakers And Burden Their Expression

It is well established that a State may not burden "a narrow class of disfavored speaker." *Sorrell*, 564 U.S. at 563; *see also, e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 340-341 (2010) (depriving "the disadvantaged person or class of the right to use speech" undermines their ability "to establish worth, standing, and respect"); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 232 (1987) (state "cannot justify selective taxation of certain publishers"); *Niemotko* v. *Mary-*

*land*, 340 U.S. 268, 272 (1951) (denial of park permit to a group of Jehovah's Witnesses because of "dislike for ... the Witnesses" was unconstitutional). Accordingly, this Court has "frequently condemned ... discrimination among different users of the same medium for expression," *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972), and will sometimes subject such speaker-based discrimination to strict scrutiny, *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 658 (1994) (strict scrutiny may apply to regulations reflecting "aversion" to what "disfavored speakers" have to say).

Speech restrictions that target particular speakers "'are all too often simply a means to control content.'" *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2230-2231 (2015). Targeting particular speakers is also a means to target particular viewpoints. *Sorrell*, 564 U.S. at 565 (statute regulating pharmaceutical promoters that was "designed ... to target [particular] speakers and their messages for disfavored treatment" went "'even beyond mere content discrimination, to actual viewpoint discrimination.'" (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391 (1992))). That is because a speaker's identity is often bound up with, or even inextricable from, the speaker's viewpoint or the content of his or her speech. *See, e.g.*, *City of Ladue*, 512 U.S. at 56.

That is true in this very case. Petitioner's ability to publicly celebrate beating a traffic ticket in court—and publicly proclaim God's goodness—has particular meaning about his reentry into full and unfettered American life after having served his sentence for his past crime. *Cf. Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-123 (1991) (striking down law that burdened the ability of former offenders to publish books). Conversely, a broad-based speech ban on former offenders, even after they have

served their time, pronounces that the views of former offenders—their thoughts on family life or current events on Facebook, or their search for employment using LinkedIn, to name a few—are less worthy of consideration by the public. Governmental pronouncements about the worthiness of a particular speaker's ideas almost always violate the First Amendment. *See id.* at 124 (Kennedy, J., concurring) ("Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld."); *accord Citizens United*, 558 U.S. at 340.

Given that this Court has refused to allow laws targeting speakers based on their wealth and power, *see Davis* v. *FEC*, 554 U.S. 724, 742 (2008), or even based on their identity as an artificial, non-human entity, *Citizens United*, 558 U.S. at 365, the North Carolina statute cannot pass muster. Here, Section 202.5 targets a class of *politically powerless natural persons*—those who have been convicted of a registrable sexual offense, but have served the sentence the State imposed—from *any* participation in the major fora of social and civic life in the Internet age. On that basis alone, Section 202.5 should be met with extreme suspicion. *Cf. id.* at 373 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.").

### B. Laws That Target Disfavored Speakers Are Contrary To The Original Purpose Of The Bill Of Rights

This Court's longstanding suspicion of speech restrictions targeting disfavored minorities is firmly grounded in the First Amendment's original purposes.

The tyranny of the majority—the prospect that political majorities would seek to restrict the rights of unpopular minorities—was an abiding concern of the Founders and a critical motivation for the Bill of Rights. *See, e.g.*, *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Founders] amended the Constitution so that free speech and assembly should be guaranteed."). Madison advocated for the Bill of Rights by arguing to the First Congress that the proposed amendments would have a "salutary effect against the abuse of power":

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Madison, Speech of June 8, 1789, *reprinted in* 5 Kurland & Lerner, *The Founders' Constitution* 20, 27-28 (1987); *cf.* The Federalist No. 51 (Madison); Amar, *The Bill of Rights: Creation and Reconstruction* 128-131 (2008).

Tocqueville identified the same abiding concern, that "the main evil of the present democratic institutions of the United States does not arise ... from their

weakness, but from their irresistible strength." *Democracy in America*, pt. 1, ch. XV (1831). Majoritarianism, he wrote, provides "inadequate securities ... against tyranny." *Id.* And individuals seeking favor or redress from the government must necessarily rely on majoritarian institutions—public opinion, elected legislators and executives, juries, and often elected judges. *Id.* Like Madison, Tocqueville went on to identify the best possible remedy as our republican institutions, including, critically, "a judiciary ... independent of the other two powers." *Id.*

For the disfavored minority that is subjected to the widespread speech ban imposed by Section 202.5, this Court's role could scarcely be more important. As many courts have recognized, harsh, even punitive restrictions on the rights of former offenders are frequently passed by majoritarian institutions. *Cf. Does #1-5* v. *Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (collecting cases and concluding that certain Michigan restrictions on where registered sex offenders "can live, work, and 'loiter'" were punitive and unconstitutional), *pet. for cert. filed*, No. 16-769 (U.S. Dec. 14, 2016). The legislators passing such sweeping laws targeting those on a list of registered sexual offenders will almost never pay a political price for such a vote; on the contrary, withholding support for such measures will incur substantial political risk. That is why this Court has long recognized its special role in safeguarding the First Amendment rights of unpopular minority groups who have little recourse in the political process. It should embrace that role in this case.

## CONCLUSION

The judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

ARI J. SAVITZKY
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

ILYA SHAPIRO
DEVIN WATKINS
CATO INSTITUTE
1000 Massachusetts
Avenue NW
Washington, DC 20001

MARK C. FLEMING
*Counsel of Record*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

ESHA BHANDARI
LEE ROWLAND
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

CHRISTOPHER A. BROOK
ACLU OF NORTH
CAROLINA LEGAL
FOUNDATION, Inc.
P.O. Box 28004
Raleigh, NC 27611

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